87-805 (1)

Supreme Court, U.S.
FILED
NOV 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES N. FLEMING,

Petitioner

v.

M. E. GIBSON, JR., ET AL.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. BENJAMIN DICK*
Law Offices of
J. Benjamin Dick
421 Park Street
Suite 2
Charlottesville, VA
22901

SAMUEL W. TUCKER
Hill, Tucker & Marsh
P.O. Box 27363
Richmond, VA 23261

*Counsel of Record

Attorneys for Petitioner

QUESTION PRESENTED

Certiorari should be granted to resolve a conflict among the Circuits of the United States Court of Appeals as to the application of Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) as to non-prison cases involving intentional deprivations of due process and equal protection rights, viz., the U.S. Fourth Circuit Panel decision below being in conflict with other Circuits' interpretations of those cases and as submitted here, with the case law of the United Sates Supreme Court.

THE PARTIES

1. The plaintiff, James N. Fleming, a black person, is a citizen of the United States and a resident of the City of Charlottesville, Virginia engaged in the real estate business.

2. The defendants Lloyd T. Smith, Jr., John K. Taggart, III, Thomas E. Albro and M. E. Gibson, Jr., are attorneys at law practicing in the City of Charlottesville as partners in the law firm of Smith, Taggart, Gibson & Albro.

3. The defendant W. Bedford Moore, III, is a professor at the University of Virginia.

4. The defendant Shelby J. Marshall is and for 18 years has been the Clerk of the Circuit Court of Albemarle County, Virginia.

5. The defendant Robert Buriak is and for 13 years has been a Deputy Clerk of the Supreme Court of Virginia at Richmond.

6. The defendant Larry J. McElwain, a resident of Albemarle County, Virginia, is an attorney at law practicing in the City of Charlottesville, and is a member of the Board of Directors of Albemarle Bank and Trust Company, (now F & M Bank), a banking institution in Albemarle County, Virginia.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Authorities	vii
Opinions Below	1
Jurisdiction	2
Constitution Provisions And Applicable Federal Statutes	2
Statement of the Case	3
Reason for Granting the Writ ..	14

I. Certiorari Should Be Granted To Resolve A Conflict Among the Circuits of the United States Court of Appeals As to the Application of Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) As to Non-Prison Cases Involving Intentional Deprivations of Due Process and Equal Protection Rights, Viz., The U. S. Fourth Circuit Panel Decision

Page

Below Being In Conflict With Other Circuits' Interpretations of Those Cases and as Submitted Here, With The Case Law of The United States Supreme Court 14

Conclusion 25

Appendix A-1

I. U.S. Fourth Circuit Unpublished Opinion of August 14, 1987 ..... A-2

II. Order of November 13, 1986, U.S. District Court for the Eastern District, Virginia A-4

III. U.S. District Court's November 13, 1986 Memorandum Opinion A-6

IV. Order of July 16, 1986, U.S. District Court for the Eastern District of Virginia A-37

V. Memorandum Opinion of July 16, 1986, U.S. District Court for the Eastern District of Virginia A-39

		Page
VI.	Virginia Supreme Court Order of February 19, 1986	A-52
VII.	Virginia Code §8.01 - 865	A-54
VIII.	Virginia Supreme Court Appellate Rules	A-56

TABLE OF AUTHORITIES

Cases **Page**

Augustine v. Doe, 740 F2d 322 (5th Cir. 1984) 15, 21, 22

Bell v. Burson, 402 U.S. 535, 542, 91 S. Ct. 1586, 1591, 29 L. Ed. 2d 90 (1971) 21

Berlanti v. Bodman, 780 F.2d 296 (3rd Cir. 1985) 22

Board of Regents v. Roth, 408 U.S., at 569-570, 92 S. Ct. at 2705 22

Boddie v. Connecticut, 401 U.S. 371, 379, 91 S. Ct. 780, 786, 28 L. Ed. 2d 112 (1971) 21

Cleveland Board of Education v. Loundermill, 470 U.S. 532 (1985) 21

Fuentes v. Shevin, 407 U.S. 67 (1972) 21

Hudson v. Palmer, 468 U.S. 517 (1984) ..... i, iv, 1, 13, 14, 16, 17, 18, 19, 22, 23, 24

Logan v. Zimmerman Brush Co. 455 U.S. 422 (1982) 18

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 565, 94 L.ED. 865 (1950) 21

Page

Parratt v. Taylor, 451 U.S. 527 (1981) .... i, iv, 1, 13, 14, 15 17, 18, 19, 22, 23, 24

Perry v. Sinderman, 408 U.S. 593, 599, 92 S. Ct. 2694 2698, 331 Ed. 2d 570 (1972) 22

Stana v. School District of City of Pittsburgh, 775 F.2d 122 (3rd Cir.) (1985) ... 19, 20, 22

Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985) 22

STATUTES AND CONSTITUTIONAL PROVISIONS

Fourteenth Amendment U.S. Constitution 2

42 U.S.C. §1983 3

Virginia Supreme Court Rules of Appellate Procedure Rules 5:20; 5:38; and 5:41; Virginia Code §8.01-685 ..... (See Appendix)

28 U.S.C. §2101 (f) 7

28 U.S.C. §1254 (1) 2

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, James N. Fleming, respectfully prays that a writ of certiorari issue to review the November 13, 1986 judgment and opinion of the United States District Court for the Eastern District of Virginia at Richmond and the August 14, 1987 judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

This 42 U.S.C. §1983 action was dismissed on a motion to dismiss and in the alternative summary judgment by the district court based on Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984). The U.S. Fourth Circuit appeals panel

concurred and affirmed.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS AND APPLICABLE FEDERAL STATUTES

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1343. Civil Rights and elective franchise:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulations, custom or usage, of any right, privilege or immunity security by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The Petitioner, James N. Fleming, by an amended complaint, sought damages

and redress under 42 U.S.C. §§1983, and §§ 1981, 1985 and 1986 for wilful and intentional violation of his constitutional rights by state actors acting with private persons through state action to take from him $233,000.00 while he was exercising his state appellate rights. He reserved on his appeal to the U.S. Fourth Circuit only his §1983 claim which he now presents to this Honorable Court.

Mr. Fleming was in the process of exercising his due process and substantive rights on a state civil matter involving libel where he was a state defendant when prior to fully exercising those rights the defendants ignored state pre-deprivation procedures and state appellate rules of Court. The defendants secretly commandeered from the inner sanctum of the Virginia

Supreme Court Mr. Fleming's state appeal bond and surety instrument cashing the same without his knowledge and before his appeal rights were fully exercised.

Mr. Fleming spent considerable money to force the return of the same only after suffering great inconvenience, pain, embarrassment and anguish as well as sizable attorney fees to regain his property to its rightful place, viz., back to the Virginia Supreme Court where his appeal was still pending. He subsequently sued the State clerks and the private actors under 42 U.S.C. §1983 to be made whole for infringements upon his constitutional rights.

Mr. Fleming had been sued as a black man for his alleged state libel against W. Bedford Moore, a white man. The state litigation began in 1977

where Mr. Fleming was named as a member of the "black race" who in an ad titled "Racism" published in the University of Virginia's student newspaper was alleged to have libeled, humiliated, and embarrassed a "white person", Mr. Moore, a University Professor.

The Virginia State Supreme Court had twice reversed all white jury damage awards (one exceeding $600,000.00) against Mr. Fleming but yet upheld personal liability. The Virginia Supreme Court ultimately in 1985 remittited the judgment to the trial judge for a substantial reduction which subsequently occurred. (The remittitur was $233,333.32.) The state litigation ended by a final state judgment on March 4, 1986 when the Virginia Supreme Court refused a state Petition to Rehear filed under the state appellate system

by Mr. Fleming. (This Court refused a writ of certiorari based on the First Amendment, Record #85-2168.) Before Mr. Fleming filed his State Petition to Rehear, the defendants had secretly commandeered his appeal bond and surety from the Virginia Supreme Court and cashed the same.

Thus, prior to Fleming's timely filing and processing of his state Petition for Rehearing to the Virginia Supreme Court as was his right, which he had a right to pursue under Virginia state appellate procedure, and before he had the opportunity to seek redress before this Court pursuant to 28 U.S.C. §2101 (f), both in violation of his state appellate rights and Virginia's pre-deprivation statute, Va. Code §8.01 - 865 as well as temporarily undoing his right to petition this Court, all

such procedures providing due process both procedurally and substantively, he alleged in his Complaint that his constitutional rights of due process and equal protection were violated willfully and maliciously by the defendants.

He pleaded that his original state appeal bond and surety in the amount of $233,000.00 secured by the letter of credit from his Bank, both of which were lodged in the inner sanctum of the Clerk's office of the Virginia Supreme Court in Richmond, Virginia, by secret arrangements unknown to him or his counsel of record and involving the knowledge and help of state ministerial clerks, were wrongly and improperly taken from the inner sanctum of the Virginia Supreme Court. The intentional acts of private actors

in conjunction with acts of state actors who acted in their official capacities on the private actors' demands, without notice to Fleming and his counsel, to obtain the original bond and surety were claimed to be actionable under 28 U.S.C. §1343 (3) and 42 U.S.C. §1983.

By the defendants combination and collective acts, Mr. Fleming asserted in his Amended Complaint the original bond and original letter of credit secretly commandeered out of the state judicial repository into the hands of Fleming's adversary, Mr. Moore, and his counsel, violated his rights and caused him great harm and damages for which he should be made whole.

First by hand, then by a car and hand again, the judicial instruments posted in a civil proceeding in order

for Mr. Fleming to have his right of appeal were immediately taken from the Virginia Supreme Court in Richmond, Virginia to Fleming's Bank in Charlottesville, Virginia. Unbeknownst to Fleming, the letter of credit was presented without a State Court order or pre-deprivation hearing with notice provided by state law to the Bank and its agent. On Moore's counsel adamant insistence, with the acquiescence of Moore, the defendants demanded that the Bank issue a cashier's check for $233,000.00 to be drawn and made payable to W. Bedford Moore.

On having in hand the bond and surety and securing the check, Moore's attorneys' had the cashier's check endorsed by Moore to their private law office account and the same of $233,000.00 was thereupon accordingly

cashed and deposited on the same day it was commandeered to the defendants sole possession and control. On a demand by Mr. Fleming and his counsel to the defendants that it be immediately returned once the clandestine operation was learned by Fleming pending conclusion of Mr. Fleming's state appeal process, the defendant Moore and his counsel utterly refused to return the money and commanded instead an explanation of why Mr. Fleming was demanding the return of the $233,000.00.

Fleming's trial counsel filed a motion with the Virginia Supreme Court to force the return of the money, bond, and surety. In due course some twenty days later, by order of the Virginia Supreme Court dated February 19, 1986, (Appendix A-52) the defendants were commanded by the State's highest

Court to return the money, bond, and surety which were returned to the Clerk of the Virginia Supreme Court. The Virginia Supreme Court stated unequivocally in ordering the return its reason, viz., "because no mandate has been certified based upon the denial of the petition for appeal and a petition for rehearing is pending. It is further ordered that the original of said letter of credit and original appeal bond in this case be returned to the Clerk's office of this Court."

In securing the same back, Fleming nonetheless incurred sizable damages, expenses, and also attorney fees which were alone in excess of $20,000.00 tantamount to actual damages for which the state court, although it had by its post-deprivation order restored

status quo, was nonetheless without adequate remedy to restore Mr. Fleming to the extent he would be made whole.

In granting the defendants' motion to dismiss and in the alternative summary judgment at the federal district court level as to Mr. Fleming's §1983 claims, the trial Court relied upon Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517, 531-33 (1984). A notice of appeal was timely filed and the U.S. Fourth Circuit Court of Appeals dispensed with oral argument citing the dispositive issues recently have been decided authoritatively affirming the district court's decision and relying upon the Parratt and Hudson cases.

A petition to rehear to the Fourth Circuit Panel was duly denied. Mr.

Fleming seeks a review by writ of certiorari to this Court.

REASON FOR GRANTING THE WRIT

Certiorari Should Be Granted To Resolve A Conflict Among the Circuits of the United States Court of Appeals As To The Application of Parratt v. Taylor 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) As to Non-Prison Cases Involving Intentional Deprivations of Due Process and Equal Protection Rights, Viz., The U.S. Fourth Circuit Panel Decision Below Being In Conflict With Other Circuits' Interpretations Of Those Cases And As Submitted Here, With The Case Law of The United States Supreme Court

Mr. Fleming's appeal to the U.S. Fourth Circuit was restricted to his 42 U.S.C. §1983 claim. He submitted the district Court, and in a Petition to Rehear, that the U.S. Fourth Circuit erred in affirming the denial of §1983 claim on the basis of the Parratt and Hudson cases.

The U.S. Fifth Circuit Court of Appeals takes an entirely different approach to the U.S. Fourth Circuit noting that the Parratt decision by the federal district and circuit courts has hardly been a model example of uniform judicial decision making.

For example, in one case, the Fifth Circuit clarified the rules of the Parratt decision for that jurisdiction. In Augustine v. Doe, 740 F.2d 322 (5th Cir. 1984), the plaintiff filed a §1983 lawsuit alleging violations of his Fourth Amendment to unlawful searches and seizures and his Fourteenth Amendment right not to be deprived of liberty and property without due process of law. The district court acting pursuant to Parratt dismissed the plaintiff's claims holding the availability of state

post-deprivation tort remedies prohibited plaintiff from recovering from §1983 redress in federal court.

The Fifth Circuit reversed holding that Parratt does not apply to alleged deprivations of substantive constitutional rights. They further held that Parratt was limited to instances in which deprivations were random and unauthorized. Further, the Fifth Circuit went on to hold that plaintiff's complaint alleged a clear violation of the Fourth Amendment.

The Fifth Circuit adopted this Court's reasoning in Hudson v. Palmer, 104 S. Ct. at 3204:

> "The controlling inquiry is solely whether the state is in a position to provide for a pre-deprivation process."

The Fourth Circuit by the decision below rejects this reasoning. It would

hold that so long as any post-deprivation process exists regardless of intentional and wilful deprivation of due process and substantive rights, be it under the Fourth or Fourteenth Amendments, then the same is adequate regardless of whether or not the state is in position to provide a pre-deprivation remedy or not and regardless of whether the acts are intentional, random, negligent, or unauthorized. The Parratt and Hudson decisions were prison rights decisions and by the ruling of the district court and U.S. Fourth Circuit panel, they are to be randomly applied to every intentional or non-intentional deprivation of constitutional rights by state actors who act with private actors even though the post-deprivation remedy of the Virginia Supreme Court

ordering the return of Mr. Fleming's bond and letters of credit and cash did not make him whole.

The Parratt and Hudson cases looked at "the impracticality of providing pre-deprivation process" which is not the case here. A State pre-deprivation procedure clearly existed which the defendants purposely ignored. (Appendix A-54).

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) in limiting the broad sweep of Parratt and Hudson clearly set forth:

> "In any event, the Court's decisions suggest that, absent 'the necessity of quick action by the State or the impracticality of providing any pre-deprivation process,' a post-deprivation hearing here would be constitutionally inadequate. *** That is particularly true where, as here, the State's only post-deprivation process comes in the form of an independent tort action. Seeking

> redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole:' *** (455 U.S. at 436-37). (Emphasis added)

No quick action by the state or its actors was required in this case nor was a pre-deprivation hearing impracticable In fact a pre-deprivation process was guarded by state appellate rules of court and by specific legislative and statutory enactment of Va. Code §8.01 - 685. The Fourth Circuit Panel ignores all of that and Logan muchless the restrictive nature of Parratt and Hudson.

In Stana v. School District of Pittsburgh, 775 F2d 122 (3rd Cir. 1985), after canvassing the authorities, Judge Slovitur wrote:

To summarize, since it is not

> practicable or possible for a governmental entity to provide pre-deprivation procedural due process when an act is random or unauthorized, the only possible remedy is through effective post-deprivation redress. The Constitution does not require that which it is impossible to provide. On the other hand, if the governmental entity could have, but did not, provide pre-deprivation procedures, a §1983 action complaining of the lack of procedural due process may be maintained in federal court, notwithstanding the availability of state judicial routes as well. (775 F.2d at 130) (Emphasis added).

Mr. Fleming's violations of constitutional rights include substantive rights as well as procedural and it is submitted that the Parratt rationale has been held inapplicable to cases alleging violations of substantive rights as well as that it be inapplicable when the post-deprivation remedy afforded Mr. Fleming did not make him whole. Where a pre-deprivation hearing is

practicable case law would indicate that a hearing shall be provided. Fuentes v. Shevin, 407 U.S. 67, at 80-82 (1972). The Augustine Fifth Circuit Court relied upon Fuentes. In Cleveland Board of Education v. Loundermill, 470 U.S. 532 (1985), Justice White writing for the Court stated:

> An essential principle of due process is that a deprivation of life, liberty or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 565, 94 L.Ed. 865 (1950). We have described "the room requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." Boddie v. Connecticut, 401 U.S. 371, 379, 91 S. Ct. 780, 786, 28 L. Ed. 2d 112 (1971) (emphasis in original); see Bell v. Burson, 402 U.S. 535, 542, 91 S. Ct. 1586, 1591, 29 L. Ed. 2d 90 (1971). This principle requires "some kind of hearing" prior to the discharge of an

> employee who has a constitutionally protected property interest in his employment. Board of Regents v. Roth, 408 U.S., at 569-570, 92 S. Ct. at 2705; Perry v. Sinderman, 408 U.S. 593, 599 92 S. Ct. 2694 2698, 331 Ed. 2d 570 (1972).

Cases interpreting Parratt and Hudson included the Third Circuit, Berlanti v. Bodman, 780 F. 2d 296 (3rd Cir. 1985); Stana v. School District of City of Pittsburgh, 775 F. 2d 122 (3rd Cir. 1985); and the Sixth Circuit; Wilson v. Beebe, 770 F. 2d 578 (6th Cir. 1985) and when analyzed, as recited in Augustine v. Doe, 740 F. 2d 322 (5th Cir. 1984), often with conflicting results.

In Hudson, this Court clearly limited the reach of Parratt including the terms "random and unauthorized" to those situations where the state cannot possibly know in advance of

a negligent or intentional deprivation of property.

> "Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for pre-deprivation process." Hudson v. Palmer, 104 S. Ct. at 3203-3204.

The Commonwealth of Virginia by its agents and state actors, the private persons involved as well, all knew or should have known the state had pre-deprivation process which they willfully and with reckless and total disregard for Mr. Fleming's rights intentionally ignored. It was not random or unauthorized, it was intended. No citizen of these United States should suffer such a grievous wrong regardless of a post-deprivation remedy particularly when the remedy provided is grossly

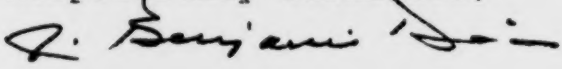
inadequate to make that citizen whole. This is a properly pleaded §1983 case which Mr. Fleming asserts that the decisions of the district court and U.S. Fourth Circuit Panel contrary to the case law decisions of this court are repugnant to Mr. Fleming's rights under the Fourteenth Amendment.

Neither Parratt nor Hudson should apply to wilful and intentional deprivations of constitutional rights where the state has or has not provided a practicable pre-deprivation process which in this case the State of Virginia clearly provided and which was totally ignored and also in cases where the post-deprivation remedy does not make the citizen whole.

CONCLUSION

For the reasons stated, the writ of certiorari should be granted.

Respectfully submitted,



*J. BENJAMIN DICK
Law Offices of
J. Benjamin Dick
421 Park Street
Suite #2
Charlottesville, VA
22901
(804) 977-6607

SAMUEL W. TUCKER
Hill, Tucker & Marsh
P. O. Box 27363
Richmond, VA 23261

Attorneys for Petitioner
*Counsel of Record

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 86-1717
UNPUBLISHED

JAMES N. FLEMING,
Plaintiff - Appellant

v.

M. E. GIBSON, ET AL.,
Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., Senior District Judge. (C/A No. 86-150-R)

Submitted: April 27, 1987
Decided: August 14, 1987

Before WIDENER, PHILLIPS, and SPROUSE, Circuit Judges.

PER CURIAM:

James N. Fleming brought this action alleging federal claims based on 42 U.S.C. §§1981, 1983, 1985 and 1986, and a state law claim for fraud, all stemming from the various defendants'

roles in obtaining payment on a $233,000.00 letter of credit posted by him to secure an appeal bond. The district court granted the defendants' motions to dismiss and for summary judgment and entered judgment in their favor.

On appeal, Fleming argues that the defendants deprived him of his property without due process of law, in violation of 42 U.S.C. §1983. The district court twice considered this claim and on both occasions properly concluded that there was no due process violation under Hudson v. Palmer, 468 U.S. 517 (1984), and Parratt v. Taylor, 451 U.S. 527 (1981). We affirm the dismissal of this claim on the reasoning of the district court. Fleming v. Gibson, C/A No. 86-150-R (E.D.Va., Nov. 13, 1986).

Fleming also argues that the district court erroneously dismissed his case with prejudice for lack of jurisdiction. This argument in without merit. The district court disposed of all the claims raised by Fleming on the merits. Therefore its final order dismissing the case with prejudice was correct.

We grant the appellees' motion for leave to file addenda to brief. We dispense with oral argument because the dispositive issues recently have been decided authoritatively, and the facts and legal arguments are adequately presented in the briefs and record.

AFFIRMED

**IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

JAMES N. FLEMING,
Plaintiff

v.

M. E. GIBSON, JR., ET AL.,
Defendants

**Civil Action No.
86-0150-R**

Filed November 16, 1986

ORDER

For the reasons stated in the memorandum this day filed and deeming it proper so to do, it is ADJUDGED and ORDERED as follows:

1. Defendants' motion for summary judgment as to plaintiff's equal protection claim under 42 U.S.C. §1983 and plaintiff's claim under 42 U.S.C. §1981 be and the same is hereby GRANTED and judgment be and the same is awarded

the defendants.

2. Defendants' motion to dismiss the balance of plaintiff's claims be and the same is hereby GRANTED.

3. Defendants are entitled to recover their taxable costs.

Let the Clerk send a copy of this order and the accompanying memorandum to all counsel of record.

/s/Robert R. Merhige
November 16, 1987

**IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

JAMES N. FLEMING,
Plaintiff

v.

M. E. GIBSON, JR., ET AL.,
Defendants

**Civil Action No.
86-0150-R**

Filed November 16, 1986

MEMORANDUM

This matter comes before the Court on defendants' motions to dismiss or, in the alternative, for summary judgment. The motions have been fully briefed and argued and are ripe for disposition.

Facts

The plaintiff, James Fleming, is a black male who previously was the defendant in a libel suit in Virginia state court. The plaintiff in the

state libel suit, W. Bedford Moore, is one of the defendants in the instant suit. Moore prevailed in his libel suit against Fleming and ultimately was awarded damages in the amount of $233,333.00.

Fleming appealed the award to the Virginia Supreme Court and post an appeal bond, which was supported by a letter of credit issued by the Albemarle Bank & Trust ("the Bank") for $233,000.00. Fleming's appeal to the Virginia Supreme Court was denied on January 24, 1986.

On January 29, 1987, Thomas Albro, a lawyer in the Charlottesville firm of Smith, Taggart, Gibson & Albro ("Smith, Taggart"), received notice that Fleming's appeal had been denied. Because he was about to begin a trial, Albro asked his law partner, Gibson,

to assist him by obtaining the original letter of credit and collecting payment on behalf of Moore, the firm's client. Albro gave Gibson copies of the Virginia Supreme Court order denying Fleming's writ, the Final Judgment Order entered by the circuit court, the appeal bond, and the letter of credit.

Mr. Gibson took these documents to the Albemarle County Circuit Court Clerk's office and asked the clerk, Shelby Marshall, to give him the original letter of credit. Ms. Marshall searched the file and discovered that the bond and letter of credit had been sent to the Virginia Supreme Court.

Ms. Marshall then telephoned the Supreme Court Clerk's Office and spoke with Robert Buriak, a Deputy Clerk, about obtaining the original bond and letter of credit. While Ms. Marshall

states that Mr. Buriak also spoke with Mr. Gibson, Mr. Buriak only recalls speaking with Ms. Marshall. The fact that the fourteen-day period for filing a petition for rehearing had not yet expired apparently was mentioned in some manner, although the parties disagree about the extent to which it was discussed. In any event, no question was raised as to whether the possible filing of such a petition prevented Mr. Buriak from transmitting the bond and letter of credit.

Mr. Buriak agreed to give the original bond and letter of credit to Mr. Gibson, as the designated representative of Ms. Marshall, in return for attested copies of these documents. However, the parties disagree about whether Mr. Buriak was informed that Mr. Gibson intended to use these

documents to collect payment from the issuing bank. While Mr. Gibson states that Ms. Marshall so informed Mr. Buriak, Mr. Buriak denies such knowledge and states his belief that he was merely returning the documents to Ms. Marshall through an officer of the court, Mr. Gibson.

Mr. Gibson drove from Charlottesville to Richmond and signed a receipt confirming that he was taking the original documents and substituting attested copies. Mr. Gibson then returned to Charlottesville. While Ms. Marshall believes that Mr. Gibson returned to her office and obtained a receipt to withdraw the original documents, Mr. Gibson states that he proceeded directly to the Bank to collect payment. Gibson showed Mr. King, Bank President, the letter of credit and

the Supreme Court order denying the petition for appeal. Mr. King stated that he needed to obtain approval for such payment from the Bank's counsel, Larry McElwain. When McElwain's phone line remained busy, King and Gibson drove to McElwain's office. McElwain reviewed the letter of credit and the Supreme Court's order for about five minutes and advised King that payment would be proper under the terms of the letter of credit.

Relying on McElwain's opinion, King returned to the Bank and issued a check payable to Professor Moore for $233,000.00 in exchange for the letter of credit. After running this check through the firm's account, Smith Taggart paid the $233,000.00 to Moore.

On February 19, 1986, the Virginia Supreme Court ordered that the

$233,000.00 received from the Bank by Mr. Gibson be returned to the Bank "because no mandate has been certified based upon the denial of the petition for appeal, and a petition for rehearing is pending." The Court further ordered that the appeal bond and letter of credit be returned to the Virginia Supreme Court. The money, letter of credit, and bond all were Procedural History.

Plaintiff filed his original complaint on March 13, 1986, alleging various state law and constitutional violations, all stemming from the various defendants' roles in making payment on the letter of credit. While difficult to unravel, Fleming appeared to allege the following claims: (1) denial of full and equal benefit of the laws under 42 U.S.C. §1981; (2) denial

of due process and of equal protection under 42 U.S.C. §1983; (3) conspiracy to deprive of equal protection under 42 U.S.C. §1985; and (4) a state law fraud claim against Gibson and the law firm of Smith, Taggart.

By order dated July 16, 1986, this Court dismissed the Section 1981 claim against the private defendants for lack of state action and the Section 1983 claim of deprivation of due process because Fleming had recovered his property through state court procedures. Thus, four claims remained for disposition: the state law fraud claim and the claim of deprivation of equal protection under Sections 1981, 1983 and 1985 -- all of which require a showing of racially discriminatory animus.

On July 28, 1986, Fleming filed

a motion asking the Court to vacate its July 16th order dismissing some of his claims. Fleming also asked leave of court to amend his complaint in light of evidence uncovered during discovery. By order dated August 14, 1986, the Court denied Fleming's motion to vacate its earlier dismissal order, but granted him leave to amend his complaint.

Fleming filed an amended complaint on August 25, 1986, and his claims therein are unclear, although he alleges that they arise under Sections 1981, 1983, 1985 and 1986. It appears that he raises the following claims: (1) deprivation of equal benefit of the laws under Section 1981; (2) deprivation of due process under Section 1983; and (3) deprivation of equal protection under Sections 1983, 1985, and 1986.

The amended complaint alleges no state law causes of action.

The thrust of Fleming's amended complaint is that Smith, Taggart engaged in a "plan" to "obtain sole possession of the letter of credit," present it to the Bank, and cash it before Fleming could file a petition for rehearing in the Virginia Supreme Court or a writ of certiorari in the United State Supreme Court. Fleming alleges that Marshall, Buriak, McElwain, and Moore knowingly participated in this "plan," which they should have known violated Virginia law. Fleming further alleges that Marshall's and Buriak's participation was motivated, at least in part, by racial animus. he then appears to allege that the entire conduct of the state libel suit has been permeated by racial prejudice.

Based on Fleming's amended complaint, all of the defendants have filed motions to dismiss the amended complaint or, in the alternative, for summary judgment.

The Merits

1. Section 1981 Claim

Plaintiff alleges that defendants deprived him of the full and equal benefit of laws enjoyed by white citizens, as guaranteed by 42 U.S.C. §1981. Such claim was dismissed by this Court as against the private defendants in its July 16, 1986, order, for failure to adequately allege state action as required by the Fourth Circuit See Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 525 (4th Cir. 1986). Thus, a section 1981 claim remains only against the public defendants, Marshall and Buriak.

In order to prove a Section 1981 violation, plaintiff must show that defendants acted with a discriminatory purpose. General Building Contractors Association v. Pennsylvania, 458 U.S. 375, 382-91 (1982). While plaintiff has sufficiently alleged that Marshall and Buriak denied him the benefit of Virginia's laws because he is black, the Court must determine whether plaintiff has produced sufficient evidence in support of this allegation to avoid summary judgment.

In ruling on defendants' motions for summary judgment, the Court must determine "whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of

either party." Anderson v. Liberty Lobby, Inc., 54, U.S.L.W. 4755, 4758 (U.S. June 25, 1986). This standard required more than a mere scintilla of evidence in support of plaintiff's claim, but rather evidence on which the factfinder could reasonably find for the plaintiff. Anderson, supra, 54, U.S.L.W. at 4758.

Thus, to avoid summary judgment on his Section 1981 claim, Fleming must produce some evidence from which the factfinder reasonable could find that Marshall and Buriak acted based on racial animus. In fact, plaintiff has produced no evidence to support this claim, but merely relies on an unsupported contention that defendants would have acted differently towards a white person because, in his experience, all white individuals are

motivated by racial prejudice. He attempts to support this contention by alleging that Mr. Buriak may have known plaintiff was black by reviewing the Supreme Court pleadings and that Ms. Marshall had no black employees in her office during the relevant time period (an allegation which Ms. Marshall disputes by affidavit). Regardless of the accuracy of these allegations, standing alone they are insufficient to state any basis from which a factfinder reasonably could infer racial animus against the plaintiff.

In fact, the evidence before the Court is uncontroverted that plaintiff's race was not discussed or considered in the conversation between Buriak and Marshall, or in the decision to release the bond and letter of credit to Gibson. It is true that plaintiff

need not produce direct evidence of discriminatory intent. However, when a party makes and supports a summary judgment motion, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial." Davis v. City of Portsmouth, 579 F. Supp. 1205, 1209 (E.D.Va. 1983) (quoting Fed.R.Civ.P. 56(e)), aff'd mem., 742 F.2d 1448 (4th Cir. 1984). Plaintiff has failed to provide adequate factual support for his allegations. Thus, summary judgment is appropriate as to plaintiff's Section 1981 claim.

2. Section 1983 Claim

Mr. Fleming appears to claim in his amended complaint that the defendants violated Section 1983 by depriving him of both due process and equal

protection.

a. Due Process Claim

Although the Court dismissed plaintiff's due process claim under Section 1983 on July 16, 1986, plaintiff places principal reliance on this claim in his amended complaint and in his response to the instant motions to dismiss or for summary judgment.

The Court has once again considered plaintiff's claim that defendants' actions deprived him of his property without due process of law. Once again, however, it finds that plaintiff has failed to allege a due process violation cognizable under Section 1983.

The central issue concerns whether Fleming received due process when the Virginia Supreme Court order the return of the $233,000.00 along with the bond and letter of credit twenty-two days

after the initial deprivation. Plaintiff argues that such post-deprivation procedures were inadequate for two reasons: (1) such procedures failed to compensate plaintiff for his mental anguish in being deprived of his money for several weeks and for costs and attorneys' fees he expended in pursuing these procedures; and (2) post-deprivation remedies are constitutionally inadequate where, as here, a pre-deprivation remedy could have been provided.

The Supreme Court has held that where the state provides an adequate alternative remedy for the loss of property, such remedy may satisfy the requirements of due process and avoid an unconstitutional deprivation. See Hudson v. Palmer, 468 U.S. 517, 531-33 (1984). Thus, at issue here is whether

the post-deprivation remedy offered was constitutionally adequate.

First, the Court addressed plaintiff's argument that the remedy afforded was inadequate because it merely returned the $233,000.00 and did not compensate the plaintiff for his mental anguish or attorneys' fees. This argument is without merit, however. The Supreme Court has squarely rejected this contention, holding that the fact that plaintiff "might not be able to recover under these remedies the full amount which he might receive in a §1983 action is not, as we have said, determinative of the adequacy of the state remedies." Hudson, supra, 468 U.S. at 535; see also Parratt v. Taylor, 451 U.S. 527, 544 (1981) (state tort claims procedure adequate even though punitive damages not available as they

were under §1983). Certainly, the Court has never held that due process required that a person be compensated for attorneys' fees expended in pursuing available procedures for recovering his property.

Thus, the state procedures used by plaintiff by which he recovered his full $233,000.00 were not constitutionally deficient merely because they failed to compensate him as fully as a Section 1983 suit might have.

Plaintiff further claims that the state procedures were constitutionally deficient because they afforded him only a post-deprivation remedy. Defendants, however, correctly argue that, in the instant case, such remedy was all that was constitutionally required or even practicable.

As plaintiff and defendants alike

have recognized, a deprivation of property due to random and unauthorized acts of state employees, rather than due to an established state procedure, do not violate due process if "adequate state post-deprivation remedies are available." Hudson, supra, 468 U.S. at 533; Parratt, supra, 451 U.S. at 541-44. As the Court explained in Parratt, when a deprivation "occur[s] as a result of the unauthorized failure of agents of the state to follow established state procedure," such conduct is unforeseeable and therefore it is not practicable for the state to provide a predeprivation hearing. Parratt, supra, 451 U.S. at 543. Thus, a post-deprivation hearing is sufficient to satisfy due process in such cases.

In the instant case, like Parratt, plaintiff complains that the defendants

committed random and unauthorized acts in obtaining payment on the bond and letter of credit. Plaintiff does not complain that existing state procedures concerning release of bonds and letters of credit were inadequate, but rather that such procedures were not followed in the instant case. Thus, any predeprivation remedy would be impracticable, and a meaningful post-deprivation remedy is sufficient to satisfy due process. Such a remedy was offered by the state within a reasonable time after the initial deprivation, and such deprivation was remedied by the return of the $233,000.00 and the Supreme Court's injunction of further action by the defendants.

Plaintiff argues that Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), rather than Parratt and Hudson, controls

the instant dispute and requires a pre-deprivation remedy. Logan reiterated the Court's holding in Parratt and Hudson that a post-deprivation remedy is sufficient when he alleged deprivation is due to the random and unauthorized acts of the defendants. Logan, supra, 455 U.S. at 435-36. The Court further held that such a post-deprivation remedy was insufficient in that case, where the deprivation was allegedly due to the established state procedure itself and not any departure from it. Logan, supra, 455 U.S. at 436.

In fact, while plaintiff argues in is Supplemental Memorandum filed with this Court on September 18, 1986, that Logan controls, in that same pleading he alleges that he was deprived of property "as a direct result of

the deliberate and wanton 'unauthorized failure' of state agents" to follow statutory procedures. Plaintiff's Supplemental Memorandum at 3. Thus, the instant case clearly is controlled by Parratt and Hudson, and the post-deprivation remedy which was afforded was sufficient to satisfy due process.

b. Equal Protection Claim

In order to allege an equal protection violation under Section 1983, the plaintiff must allege racial animus by the defendants. Personnel Administrator v. Feeney, 442 U.S. 256, 272-76 (1979). As the defendants point out, plaintiff's only allegation that race was a factor in any of the defendants' conduct was made against the public defendants, Marshall and Buriak. Therefore, plaintiff has failed

to state an equal protection claim against the private defendants.

Even assuming that plaintiff has adequately alleged an equal protection claim against the private defendants, he has provided insufficient evidence of racial animus by any of the defendants to overcome defendants' motions for summary judgment. Plaintiff's only evidence of racial animus by the Smith, Taggart law firm and its individual members is that Mr. Albro used his first two peremptory strikes against black veniremen in Fleming's state libel trial and that Mr. Albro allegedly used the term "racist hoax" in referring to that suit. As to defendant McElwain, Fleming simply alleges that the Bank Board of Directors once was consulted before making payment on a white person's letter of credit, while McElwain made

the decision independently in Fleming's case. Concerning defendant Moore, plaintiff reiterates the allegations he made against Moore in the newspaper article which formed the basis for Moore's libel suit against Fleming; specifically, he alleges that Moore conveyed property, which later was conveyed to Fleming, by a racially restrictive deed and that Moore had requested a tree buffer between his development, consisting of single family dwellings, and Fleming's proposed development of multi-family townhomes. Even plaintiff's counsel, when asked at the hearing to provide some factual basis to support a finding of racial animus, could only reiterate Fleming's sincere belief that the defendants harbor such racial animus against him.

Such unsupported beliefs, no matter

how sincerely held, cannot form the basis for an equal protection claim. The Court finds insufficient evidence from which a factfinder reasonably could conclude that the private defendants acted out of racial animus. As already discussed in relation to plaintiff's Section 1981 claim, the record also is devoid of evidence from which the factfinder could conclude that the public defendants were motivated by racial animus. Therefore, both the public and private defendants are entitled to summary judgment on the equal protection claim.

3. Section 1985 Claim

Fleming's Section 1985 claim alleges that the defendants conspired to deprive him of equal protection. For conduct to be actionable under Section 1985, the plaintiff must prove that the

conspirators were motivated by racial animus. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). As already discussed concerning Fleming's claims under Sections 1981 and 1983, Fleming has provided insufficient evidence of racial animus to defeat defendants' motions for summary judgment.

4. Section 1986 Claim

Fleming added this additional claim in his amended complaint, apparently against defendants Marshall and Buriak. Section 1986 imposes liability on those who have actual knowledge that a conspiracy to deprive the plaintiff of equal protection under Section 1985 is about to occur, have power to prevent such deprivation, and neglect or refuse to do so.

Liability under Section 1986 is predicated upon proof of a Section

1985 conspiracy. See, e.g., Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 834 (1st Cir.), cert. denied, 459 U.S. 989 (1982). Because Fleming has presented insufficient evidence of racial animus to overcome summary judgment under Section 1985, his Section 1986 claim must fail as well.

5. State Law Fraud Claim

While plaintiff's original complaint alleged a pendent state law fraud claim against Gibson and his law firm, his amended complaint makes no such allegations. However, in his response to defendants' motions for summary judgment filed on September 2, 1986, plaintiff argues this claim.

Because plaintiff's amended complaint does not raise the state law claim, it is not property before the Court. However, were the claim

before the Court as it was raised in plaintiff's original complaint, it would merit dismissal on one of several theories.

First, where, as here, plaintiff's federal claims are all resolved by dismissal or summary judgment, the federal court would not retain jurisdiction of the pendent state law claim by itself. See Reamer v. United States, 459 F.2d 709 (4th Cir. 1972).

Even were the Court to retain jurisdiction over the state law claim, plaintiff does not have standing to raise this cause of action. Under Virginia law, the elements of fraud are: (1) a false representation; (2) of a material fact; (3) made intentionally and knowingly; (4) with the intent to mislead; (5) reliance by the misled party; and (6) resulting

damage to the misled party. Winn v. Aleda Construction Co., 227 Va. 304, 308, 325 S.E. 2d 193, 195, (1985). According to plaintiff's original complaint, the Bank relied upon and was misled by defendant Gibson's alleged misrepresentation, i.e., his failure to provide Buriak, Marshall and the Bank with a copy of the Final Judgment Order which allegedly would have revealed the inappropriateness of making the payment. Because it was the Bank, and not Fleming, who was allegedly misled, plaintiff does not have standing to allege a cause of action for fraud. Thus, the state law fraud claim should be dismissed.

Conclusion

Based on the foregoing reasons, plaintiff's due process claim under 42 U.S.C. §1983, his claims under 42

U.S.C §§1985 and 1986, and his state law fraud claim shall be dismissed. Further, summary judgment shall be entered in favor of the defendants on plaintiff's equal protection claim under 42 U.S.C. §1983 and his claim under 42 U.S.C. §1981.

An appropriate order shall issue.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date - November 13, 1986

**IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

JAMES N. FLEMING,
Plaintiff

v.

M. E. GIBSON, JR., ET AL.,
Defendants

**Civil Action No.
86-0150-R**

ORDER

For the reasons stated in the accompanying memorandum entered this day and deeming it proper so to do, it is hereby ADJUDGED and ORDERED that:

1. plaintiff's claim under 42 U.S.C. §1983 for violation of plaintiff's rights to due process of the law is DISMISSED;

2. plaintiff's claim under 42 U.S.C. §1981 is DISMISSED as to defendants Gibson, Albro, Smith, Taggart,

Moore, McElwain, and the law firm of Smith, Taggart, Gibson & Albro;

3. all other motions to dismiss are DENIED; and

4. defendants' motion to strike is DENIED.

Let the Clerk send a copy of this order and the accompanying memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date - July 16, 1986

**IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

JAMES N. FLEMING,
Plaintiff

v.

M. E. GIBSON, JR., ET AL.,
Defendants.

**Civil Action No.
86-0150-R**

MEMORANDUM

Plaintiff, James Fleming, has sued numerous defendants alleging federal claims based on 42 U.S.C. §§1981, 1983 and 1985, and a state law claim from fraud. The matter presently before the Court is defendants' motions to dismiss. These motion have been fully briefed and are accordingly ripe for disposition.

Background

The plaintiff in this matter,

James Fleming, had previously been a defendant in a suit for libel in Virginia state court. The plaintiff in the state libel suit, W. Bedford Moore, is one of the defendants in the instant suit. Moore prevailed in his libel action and was ultimately awarded damages in the amount of $233,333.00.

Fleming appealed the award to the Virginia Supreme Court and posted an appeal bond, which was supported by a letter of credit issued by the Albemarle Bank & Trust Co. ("AB&T"), for $233,000.00. Fleming's appeal was denied by the Virginia Supreme Court on January 24, 1986.

Fleming alleges that, on January 29, 1986, prior to the expiration of the fourteen-day period within which Fleming could file a petition for

rehearing in the Virginia Supreme Court, the defendants unlawfully obtained payment of the $233,000.00 appeal bond.

Defendants Lloyd Smith, John Taggart, M. E.. Gibson and Thomas Albro are members of the law firm of Smith, Taggart, Gibson and Albro, which represented Moore in the state libel action. Defendant Shelby Marshall is Clerk of the Circuit Court of Albemarle County, and defendant Buriak is a Deputy Clerk of the Supreme Court of Virginia. Defendant McElwain is an attorney and a director of the Albemarle Bank & Trust Co.

Plaintiff contends that defendant Gibson, acting in concert with all of the other defendants, obtained payment of the letter of credit from AB&T. Defendant Marshall is alleged to have provided attested copies of the appeal

bond and letter of credit to defendant Gibson. Defendant Buriak is alleged to have delivered the original letter of credit and appeal bond to defendant Gibson, in exchange for the attested copies, for delivery to defendant Marshall. Plaintiff contends that Marshall then delivered the original letter of credit to defendant Gibson. Gibson subsequently presented the original letter of credit and the Virginia Supreme Court's order denying Fleming's appeal to AB&T. After consulting with defendant McElwain, AB&T delivered a cashier's check to defendant Gibson in the amount of $233,000.00.

On January 30, 1986, Fleming filed a petition for rehearing in the Virginia Supreme Court. On February 19, 1986, the Virginia Supreme Court ordered

that the $233,000.00 paid by AB&T be returned to AB&T, and that the original letter of credit and appeal bond be returned to the Clerk of the Virginia Supreme Court. This order was satisfied on February 25, 1986. On March 7, 1986, the Virginia Supreme Court denied Fleming's petition for rehearing.

Fleming filed the instant action in this Court on March 13, 1986 alleging that he was deprived of his rights to due process and equal protection of the law in violation of 42 U.S.C. §1983. Plaintiff further alleges that he was discriminated against on account of his race and that his rights under 42 U.S.C. §§1981 and 1985 were therefore violated. Finally, plaintiff has alleged a state law claim for fraud.

Defendants have filed motions to dismiss all of plaintiff's claims

or, in the alternative, to strike certain portions of the complaint.

Merits

1. 42 U.S.C. §1983 - Section 1983 creates a cause of action for the deprivation of federally-protected rights. Although §1983 requires that such deprivation be inflicted by persons acting "under color of state law," this requirement has been interpreted as including private persons who conspire with state officers. See, e.g., Dennis v. Sparks, 449 U.S. 24, 27-28. Plaintiff alleges that defendants violated his rights to due process and equal protection of the laws. The Court will address each of these contentions in turn.

A. Due Process - Plaintiff contends that defendants' illegal procurement of payment of $233,000.00 deprived

him of his property without due process of the law. Plaintiff asserts that defendants did not have the right to cash the bond until after the time for filing a petition of rehearing in the Virginia Supreme Court had expired.

It is currently a disputed matter whether defendants were in fact required to wait until after the expiration of the time to petition for rehearing before cashing the bond. Even if defendants should have waited, however, the Court finds that there was no due process violation. The property interest at issue is the appeal bond and letter of credit for $233,000.00. Plaintiff was, however, able to recover the $233,000.00 through procedures provided by the state court. Accordingly, because plaintiff was able to recover his

property through the use of state procedures, his due process rights cannot have been violated.

B. Equal Protection - Plaintiff also contends that his right to equal protection of the laws was violated because defendants' actions were racially motivated. The Court has serious doubt as to whether plaintiff will be able to prove such a contention. Plaintiff states in his reply to defendants' motions to dismiss that "[i]t is submitted that Mr. Fleming's adversaries not only let greed disturb their professional and official collective judgments, the evidence will likely show that they wanted to put this black man down." Memorandum Response to Defendants' Gibson; Albro; Smith, Taggart, Gibson & Albro; Moore; and McElwain Motion to Dismiss and Motion

to Strike [sic] at 17. The Court is disturbed by the apparent lack of support for plaintiff's allegations of discrimination. It does not, however, appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Accordingly, dismissal would be inappropriate. Plaintiff is advised, however, that if his claims of racial discrimination ultimately prove to be as groundless as they currently appear to be, the Court will not hesitate to impose sanctions upon plaintiff and plaintiff's counsel.

2. 42 U.S.C. §1981 - Section 1981 of Title 42 of the United States Code provides that "[a]ll persons within the jurisdiction of the United States

shall have the same right in every State . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . ." Plaintiff's claim in the instant case appears to be that he was denied the full and equal benefit of the laws.

Although a claim grounded in §1981's contracts clause may be asserted against private persons, a claim based on the "full and equal benefits clause" requires state action. See Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 525-526 (4th Cir. 1986). Since "it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law," Mahone v. Waddle, 564 F.2d 1018, 1029

(3rd Cir. 1977), cert. denied, 438 U.S. 904 (1978), plaintiff's §1981 claim against the private defendants -- Gibson, Albro, Smith, Taggart, Moore, McElwain, and the law firm of Smith, Taggart, Gibson & Albro -- must be dismissed. Although the Court has serious doubt as to whether plaintiff can establish racial discrimination by the state defendants -- Marshall & Buriak -dismissal as to these defendants would be inappropriate.

3. 42 U.S.C. §1985 - Although plaintiff does not identify the particular provision in §1985 on which his claim is based, it would appear that plaintiff is relying of §1985 (3) which, among other things, makes actionable a conspiracy to deprive a person of the equal protection of the laws. As it appears that such

a claim may be asserted against private, as well as state, actors, defendants' motion to dismiss plaintiff's §1985 claim shall be denied.

4. Fraud - Plaintiff's claim for fraud is based on the manner in which payment of the $233,000.00 was obtained. Defendants contend that plaintiff cannot assert a claim for fraud because plaintiff did not personally rely on any representations made by any of the defendants, as payment of the $233,000.00 was obtained, not from plaintiff, but from AB&T. The Court, however, is uncertain as to whether it is appropriate to place such a narrow construction on the requirements for a claim of fraud. It is clear that plaintiff was the person who was primarily affected by the payment of the $233,000.00; it

may be that plaintiff may assert a claim for fraud based on some type of agency relationship with AB&T. Although the Court does not hold that plaintiff could assert a valid claim of fraud based on reliance by AB&T, the issue is sufficiently unclear at this time as to make dismissal inappropriate.

5. Motion to Strike - Defendants have also moved to strike certain material contained in plaintiff's complaint on the ground that such material is redundant, immaterial, impertinent and scandalous. Defendants' motion shall be denied, as the material at issue could be relevant to plaintiff's claim of race discrimination.

An appropriate order shall issue.

/s/ Robert R. Merhige, Jr.
United States District Judge
Date - July 16, 1986

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 19th day of February, 1986.

JAMES N. FLEMING,
Appellant,

against

W. BEDFORD MOORE, III,
Appellee.

RECORD NO. 850622
Circuit Court no.
976-L (Appeal, etc.)

From the Circuit Court of
Albemarle County

Upon consideration of the pleadings filed herein following this Court's order of January 24, 1986, it is ordered that the $233,000.00 received by counsel for appellee from Albemarle Bank and Trust Company pursuant to Irrevocable Letter of Credit No. LC29-U-11117 be returned to that institution because no mandate has been certified based

upon the denial of the petition for appeal, and a petition for rehearing is pending. It is further ordered that the original of said letter of credit and the original appeal bond in this case be returned to the clerk's office of this Court.

David B. Beach
Clerk

SECTION 8:01 - 685 OF THE CODE OF VIRGINIA:

Entry of decision in lower court; issue of execution thereon. The Court or other tribunal from which any case may have come to an appellate court shall enter the decision of the appellate court as its own, and execution or other appropriate process may issue thereon accordingly. When that decision is received by the clerk or the secretary of the court or tribunal below, he shall enter it of record in his order book, and thereupon such execution may issue and such proceedings be had in the case as would have been proper if the decision had been entered in court or by such tribunal.

If the judgment of the lower court or tribunal is affirmed, in whole or in part, by the decision of an appellate

court, execution or other appropriate process may issue thereon against the principal and surety on any appeal bond which may have been the interest and cost and the damages awarded by the appellate court, not exceeding, however, the penalty of such bond.

VIRGINIA SUPREME COURT APPELLATE RULES
Rules 5:20, 5:38 and 5:41

Rule 5:20. Denial of Appeal; Petition for Rehearing.

When a petition for appeal is denied, the clerk of this Court shall mail a copy of the order denying the appeal to counsel for the appellant and counsel for the appellee. Counsel for the appellant may, within 14 days after the date of this notice, file a petition for rehearing in the office of the clerk of this Court. The petition shall state that a copy has been mailed or delivered to counsel for the appellee. Eight copies shall be filed. Carbon copies are acceptable. Oral argument on the petition for rehearing will not be allowed. No responsive brief shall be filed unless requested by this Court. The clerk of this Court shall notify counsel for the appellant

and counsel for the appellee of the action taken by this Court on the petition for rehearing.

Rule 5:38. Mandate.

(a) **Time.** - When there can be no further proceedings in this Court, the clerk of this Court shall forward its mandate promptly to the clerk of the court or commission in which the case originated and to the clerk of the Court of Appeals if the case has been heard by that court.

(b) **Opinions.** - If the judgment or order is supported by an opinion, a certified copy of the opinion shall accompany the mandate.

Rule 5:41. Procedure Upon Appeal or Petition to Supreme Court of the United States.

If a party proposes to file an appeal with the Supreme Court of the United States or seek a writ of certiorari from that court, this Court may, upon motion filed within 15 days after the date of the order of this Court deciding the case, and upon compliance with such conditions as this Court may impose, defer the issuance of its mandate until proceedings in the Supreme Court of the United States have been terminated. Thereupon, the mandate shall issue forthwith.